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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 898

FRED LOCHMANN,

Petitioner,

vs.

ED SYKES FOR AND IN BEHALF OF HIMSELF AND CERTAIN OTHERS SIMILARLY SITUATED AND AS AGENT FOR THOSE OTHERS, TO-WIT: MACK PHILLIPS, JOHN W. PHILLIPS, LEWIS GRIFFIN, LEROY GRIFFIN, WESLEY V. LEWIS, AND ALBERT HEADLEY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS AND BRIEF IN SUPPORT THEREOF.

FRED HINKLE,
Counsel for Petitioner.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

Comes now your petitioner, Fred Lochmann, and respectfully represents to the Court:

I.

Summary Statement of Matter Involved.

This case was begun in The District Court of Sedgwick County, Kansas, by the respondents seeking to bring the

petitioner under the provisions of the Fair Labor Standards Act of Congress, 1938 (U. S. C. A. Title 29, Sec. 201 et seq.).

A. The petition of the respondents alleges that the petitioner (defendant below) was engaged under the trade name of The Sunflower Sausage and Packing Company in the slaughtering of livestock, packing and curing of meat and meat products and that he was engaged in interstate commerce and in the production of goods for interstate commerce (R. 14).

The District Court found that the petitioner was engaged in the slaughtering of live stock, packing and curing of meat and sausage and meat products but made no shipment of goods outside of the State of Kansas, filled no orders for shipment to customers outside of Kansas, sold his goods to customers only in the State of Kansas, and was not subjected to Federal Inspection (R. 223). The Trial Court, however, found that the petitioner sold the hides off cattle slaughtered by him to the Reed Hide Company in Wichita, Kansas, which company was engaged in buying hides and after bailing and salting the hides, shipped them to concerns outside of the State of Kansas, all within the knowledge of the petitioner. The Trial Court further found that the petitioner sold the offal and hooves to the Wichita Desiccating Company in Wichita, which after making them into by-products shipped the by-products to points outside of Kansas (R. 227). The petitioner parted with title to these articles at his dock and exercised no further control over them. The Trial Court found that the respondents, in skinning the hides off the cattle, separating the bones from the meat, cutting off the hooves and separating the offals, constituted the production of goods for interstate commerce and that the petitioner in so doing did not comply with the Fair Labor Standards Act (R. 225). The judgment of the Trial Court was affirmed in its entirety

by the decision of the Supreme Court of Kansas (R. 234 et seq. 156 Kans. 223, 132 Pac. (2nd) 620).

B. The Trial Court found that the respondents, during the time which they worked for the petitioner, only worked a portion of their time in the performance of the duties above set out. (Finding 15, R. 228 and R. 237-238.) The Supreme Court of Kansas in its decision correctly assumed that the producing of these articles worked on by the respondents was only a small percentage of the production of the petitioner's plant (R. 238). That is to say; only a small portion of the time in which the respondents worked for the petitioner was consumed in the skinning of cattle and cutting out the bones and offal. The petitioner urged at every stage of the trial, before the Trial Court and before the Supreme Court of Kansas, that the burden was upon the respondents to establish the amount of time they consumed in working on these articles and separate the same from the time they worked on other articles, which, all conceded, could not be subjected to the impact of the Fair Labor Standards Act. This was brought before the Trial Court on written requests for instructions and to submit special questions to the jury, (Requested instructions 10, 11, 12, see R. 151-152 and Request for question 4, R. 147) and before the Supreme Court of Kansas by specifications of error (R. 238 et seq.) by argument in brief and upon motion for rehearing. The Petitioner constantly urged that the only time in which he could be subject to the condemnation of the Act was during that time his employees, the respondents, were in the production of goods for interstate commerce, which is conceded, was but an infinitesimal portion of their time. The undisputed evidence showed that the relation of the hides to the total business of the petitioner was 2.9 per cent in so far as money value of the business was concerned. The bones and offal and

hooves sold to the Wichita Desiccating Company brought twenty to thirty dollars per week (R. 123-124). An inconsequential portion of the whole business of the petitioner.

The Trial Court held that the petitioner was subject to the provisions of the Act during the whole of the time the respondents were in his employ regardless of the character of the work they were performing and the decision of the Trial Court was affirmed in its entirety by the Supreme Court of Kansas.

C. The petitioner, in event he should be held to be subject to the Act, elected to exempt himself from the operation of the Act for a period of fourteen (14) consecutive weeks in each consecutive year, beginning January first, by virtue of Section 7 (c) of the Act (R. 139) (29 U. S. C. A. Sec. 207 et seq.) (Inter. Buln. No. 14, Pg. 11) (R. 239):

> "In the case of an employer engaged in the first processing of * * * any agricultural * * * commodity * * *, or in handling, slaughtering, or dressing * * * livestock, the provisions of subsection (a) during a period or periods of not more than fourteen weeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

In determining this question, the Supreme Court of Kansas, in affirming the judgment of the Trial Court, says: "Under finding fifteen of the Trial Court, the plaintiffs (respondents here) devoted only a part of their time to handling, slaughtering and dressing live stock and a part of their time to non-exempt activities". It will be observed that the opinion of the Supreme Court of Kansas recognizes that the respondents worked only a portion of their time in the preparation of goods for interstate commerce and for that reason the Court refuses to allow the petitioner the fourteen week exemption from the Act as provided in Sec-

tion 7 (c) of the Act. We, of course, contend that the respondents did not work any of their time in the preparation of goods for interstate commerce, (see A above) but if the decision of the Supreme Court of Kansas is correct that the respondents only worked a portion of their time in the preparation of goods for interstate commerce, then surely the decision must be incorrect in subjecting the petitioner to the impact of the Act for the benefit of the respondents during the whole period of the time which the respondents were in the employment of the petitioner: on the other hand, if the opinion is correct in that the petitioner was subject to the terms of the Act during all of the time that the respondents were in his employ, then the petitioner is entitled to the fourteen week exemption under Sec. 7 (c) of the Act. For that reason we contend that the opinion of the Supreme Court of Kansas is not consistent with itself, holding on the one hand that the respondents are entitled to the benefit of the Act for work weeks of sixty-three and one-half hours per week (R. 221), and time and one-half for overtime during all of the time they were in the employment of the petitioner, and on the other hand holding that the petitioner cannot take advantage of the Act when it reflects in his behalf because the respondents did not expend all of their time in the preparation of goods for interstate commerce (R. 240).

D. The Supreme Court of Kansas affirmed the Trial Court in allowing judgment for the respondents under the Act, the sum of $4938.36, and in addition thereto, allowed the respondents attorney fees in the additional sum of $3,000.00 (R. 233-234). The Act provides that if a recovery is had by the employees, the Court shall assess in their behalf a reasonable attorney fee against the employer (29 U. S. C. A. Sec. 216 b). We contend that the Court committed abuse of discretion in assessing so large an attorney

fee, that this allowance constitutes in this case, a misinterpretation of the Act, that Congress did not contemplate such a burden being placed upon a citizen, who, in good faith, seeks the judgment of the Courts in an attempt to honestly and fairly determine his rights. That the allowance made here is wholly incompatible with a proper construction and interpretation of the Act of Congress (R. 240).

A certified copy of the entire record of this case in the Supreme Court of Kansas is hereby furnished as an exhibit to this application.

II.

Jurisdiction.

(1.) The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 344 (Jud. Code, Sec. 237 (b) as amended), also *Higgins* vs. *Carr Bros. Company,* 87 Law Ed. 398, U. S. —. Decided January 18, 1943, No. 97, October Term, 1942.

(2.) The judgment became effective in the Trial Court April 4th, 1942 (R. 235). An appeal was duly perfected and the decision of the Supreme Court of Kansas was filed January 9th, 1943 (R. 233). Motion for Rehearing was filed January 23rd, 1943 (R. 241). Motion for Rehearing was denied on February 1st, 1943 (R. 241). The decision and judgment of the Supreme Court of Kansas became final and was entered February 1st, 1943. On February 8th, 1943, the Supreme Court of Kansas granted an order staying the execution of judgment and staying the mandate for a period of ninety (90) days from February 1st, 1943, within which to enable Fred Lochmann, petitioner herein, to apply to The Supreme Court of the United States for a Writ of Certiorari and to docket the case, etc. (R. 246-248).

(3.) At each stage in the proceedings in the Trial Court and in the Supreme Court of Kansas upon appeal and upon motion for rehearing, the petitioner raised every question which he presents here concerning the application and interpretation of an Act of Congress known as The Fair Labor Standards Act of Congress 1938, (U. S. C. A. Title 29 Sec. 201 et seq.) The questions were first raised in the Trial Court by Petitioners (defendants) in defendant's answer (R. 25) then by demurrer to respondent's evidence and motion for directed verdict (R. 89-90) and again for directed verdict (R. 134-135) and by requests for special questions (R. 146) and by requests for special instructions (R. 148) and on motion for new trial (R. 203), motion for judgment notwithstanding verdict of jury (R. 205), supplemental motion for new trial (R. 205), supplemental motion for new trial on special issues (R. 207), motion to make certain findings of fact and conclusions of law and to strike certain findings of fact and conclusions of law made by the Trial Court (R. 210), by second supplemental request for findings of fact and conclusions of law, and to strike certain findings and conclusions (R. 214 et seq.). All of the demurs, motions for directed verdict, requests to submit special questions and instructions, requests for special findings and conclusions, motions for new trial and to strike certain findings and conclusions were overruled and denied by the Trial Court. (R. 92, 93, 143, 217, 232, 234, 235, 236.) In the Supreme Court of Kansas the questions were presented on specifications of error (R. 238 et seq.) and on Motion for Rehearing which was denied (R. 241).

(4.) The Supreme Court of Kansas is the highest Court in and for the State of Kansas and the highest Court in and of the State of Kansas in which the decision could be had, and the decision was finally entered there upon the denial of the motion for rehearing, February 1st, 1943 (R. 241).

(5.) The petition for the writ is presented under Rule 38, Paragraphs one and five, Sec. A, of the Revised Rules of this Court adopted February 13, 1939, and effective February 27th, 1939.

III.

Questions Presented.

The questions presented on this petition may be stated as follows:

A. Are the employees (respondents) of the petitioner engaged either in interstate commerce or in the preparation of goods for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938 (U. S. C. A. Title 29, Sec. 201 et seq.), when they simply skin hides from cattle, cut bones, hooves, and offal from the slaughtered animals in order to obtain the edible meat, when the hides, bones, hooves, and offal are sold by petitioner at his dock, taken by the purchasers under their own title to their own plants where they are processed or made into by-products and in such changed form are ultimately transported to other states by the purchasers?

B. Are the employees of the petitioner entitled to have the benefits of the wage scale set up by the Fair Labor Standards Act during all of the time they are in the employment of the petitioner when only a small portion of their time is consumed in working on or preparing goods which are alleged to move in interstate commerce, when they work the greater portion of their time on goods which they concede are not being prepared for interstate commerce?

C. If the employees of the petitioner are engaged in the preparation of goods for interstate commerce, then is not the petitioner entitled to claim a fourteen (14) week ex-

emption from the operation of the Act under Sec. 7 (c) of the Act?

D. If the employees of the petitioner are engaged in the preparation of goods for interstate commerce and if in such an event it is the duty of the Court to fix a reasonable attorney fee to be paid by the petitioner under Sec. 16 (b) of the Act, then has not the Court, in fixing an attorney fee of $3,000.00 in addition to allowing a judgment of $4938.36, abused its discretion, gone beyond the reason and spirit of the Act and beyond the intention and contemplation of Congress when it framed the Act?

Reasons for the Allowance of the Writ.

The petitioner relies on the following reasons for the allowance of the writ of certiorari:

A. The Supreme Court of Kansas in affirming the judgment of the Trial Court held that the respondents (plaintiffs below), while they were employees of the petitioner, produced goods for interstate commerce within the meaning of the Act of Congress in question here is in conflict with the following decisions, which hold that indirect effect only on interstate commerce will not bring the employees of the petitioner under the Act.

Schecter v. *United States,* 295 U. S. 495, 79 Law Ed. 1570, where it is said,

> "* * * the distinction between direct and indirect effects of instrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise as we have said, there would be virtually no limit to the Federal Power, and for all practical purposes we should have a completely centralized government."
>
> "Where the effect of intrastate transactions upon interstate commerce is merely indirect, they do not fall

within the power conferred upon Congress by the Commerce Clause of the Federal Constitution."

Jewell Tea Company v. *Williams,* 118 Fed. (2nd) 202, where it is held by The Tenth Circuit Court of Appeals that:

"* * * the mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce."

Santa Cruz Fruit Packing Company v. *National Labor Relations Board,* 303 U. S. 453, 82 Law Ed. 954. The Court said:

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection."

National Labor Relations Board v. *Jones and Laughlin Steel Corporation,* 301 U. S. 1, 81 Law Ed. 893.

"The scope and power of Congress over interstate commerce may not be so extended as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Kirschbaum v. *Walling,* 316 U. S. 517, 86 Law Ed. 1638. This case holds that each case must be determined on the exact facts to determine whether or not the Act was intended to, or does, cover the activities of the party.

United States v. *Darby Lumber Company,* 85 Law Ed. 395, 312 U. S. 100. The Court said in construing the phrase 'produced for interstate commerce':

"It embraces at least the case where an employer engaged, * * * in the manufacture and shipment of goods in filling orders of extra-state customers, manufactures his products with the intent or expectation that according to the normal course of his business, all or some part of it will be elected for shipment to those customers."

B. The Supreme Court of Kansas, in holding that the employees (respondents) of the petitioner were entitled to the benefits of the Act for all of that period of time which they were in the employment of the petitioner regardless of the character of work they were performing and when by the undisputed facts they worked only a small portion of their time on products, which could ever, by any conception, and even in a changed form, enter the arteries of interstate commerce, went further than the terms of the Act will permit.

Warren-Bradshaw Drilling Company v. *Hall*, — U. S. — 63 S. Ct. 125, 87 Law Ed. 99. The Court said:

"The burden was therefore upon the respondents to prove that in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees engaged in the production of goods within the meaning of the Act, and that such production was for interstate commerce."

Walling v. *Jacksonville Paper Company*, 87 Law Ed. 393, No. 336, October Term, 1942, decided January 18, 1943. The Court said:

"The applicability of the Act is dependent on the character of the employee's work." If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was

established by the test we have described, he is covered by the Act.

We submit that even if we should adopt the view of the Supreme Court of Kansas that the skinning off the cattle hides and separating the bones and offal from the edible meat constitute the preparation of goods for interstate commerce within the meaning of the Act, that nevertheless the time expended on such work by the employees here was so inconsequential and unsubstantial as compared to the other work which they performed that this portion of their work does not bring them within the Act.

C. If the decision of the Supreme Court of Kansas should be held to be correct and if the respondents are engaged in the production of goods for commerce, then the petitioner is entitled to take an exemption from the Act for a period of fourteen (14) weeks for each employee so engaged and in each calendar year under Section 7 (c) of the Act. (29 U. S. C. A. Sec. 207 et seq. Sec. 7 c, also Interpretative Bulletin No. 14, Page 11, issued by United States Department of Labor, June, 1940).

The Supreme Court of Kansas seems to be the only appellate Court which has passed on this question. The case of *Fleming* v. *Swift and Company,* 41 Fed. Supp. 825, holds this exemption cannot be claimed if the employee works a part of his work week on goods that are not in interstate commerce. Here, however, the petitioner is held to be under the Act for all of the weeks which the respondents worked and it appears to us that if such a holding is to stand then the petitioner is entitled to the exemption. To hold otherwise is to cause the decision to confound itself.

D. We believe that the Supreme Court of Kansas, in allowing an attorney fee to the respondents of $3,000.00

for the work of their attorneys in recovering a judgment of $4,938.36, went further than the Act will permit.

The Supreme Court of Tennessee, in *Robinson & Company,* v. *La Rue,* 156 S. W. (2nd) 432, allowed an attorney fee of one dollar where the total recovery was $1,111.80. We call the Court's attention to the excellent dissenting opinion of Huxman, Circuit Judge, in *Midcontinent Pipe Line Company* v. *Hargrove,* 129 Fed. (2nd) 655, which we think very applicable here. The authorities on this question are not numerous and we have found none that make such an extreme interpretation of the Act as the Supreme Court of Kansas, the result is a very extreme hardship on the petitioner in making an honest effort to have a judicial determination of his rights.

Wherefore, your petitioner respectfully prays that this Honorable Court order as follows:

a. That a writ of certiorari be issued under the seal of this Court directed to The Supreme Court of the State of Kansas commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in Cause No. 35,643, in said Court, entitled Ed Sykes, et al., appellees, *vs.* Fred Lochmann, appellant, to the end that said cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment and decision of the Supreme Court of the State of Kansas in said case be reversed by this Court.

b. That this petition for a writ of certiorari be assigned to the summary docket of this Court and assigned for oral argument and that the Court grant to your petitioner leave to submit oral argument for a period of one-half hour with the presentment of this petition on a day and hour certain convenient to the Court; within the purview of Rule 28, as formulated by this Court.

c. That your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just: And your petitioner will ever pray.

FRED LOCHMANN,
Petitioner.

FRED HINKLE,
Wichita, Kansas,
Counsel for Petitioner.